U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2006

Case No.: 2006-LHC-00175

OWCP No.: 06-192452

In the Matter of:

M. W. S.,
Claimant,
v.
CONTAINTER MAINTENANCE CORP.
Employer,
and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances: Ralph R. Lorberbaum, Esq.
For the Claimant

G. Mason White, Esq.
For the Employer

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act (the Longshore Act), as amended, 33 U.S.C. §§ 901 et seq. (2000).

A formal hearing was held in Savannah, Georgia on May 11, 2006, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Longshore Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

Claimant and Employer have reached the following stipulations:

1. The Longshore Act applies to this claim.

2. An employer-employee relationship existed between Claimant and Employer on October 20, 2003.

3. Claimant's left shoulder injury arose out of and in the course of his employment with Employer.

4. On October 20, 2003, the date of the accident, Claimant was working for Employer at the Garden City Terminal of the Georgia Ports Authority when he heard a pop in his left shoulder as he was pulling on a slider pin to allow a chassis to slide on a container.

5. Employer received timely notice of Claimant's injury. Notice was received on the date of the accident.

6. Employer completed a First Report of Injury on October 20, 2003.

7. Claimant's average weekly wage at the time of the accident was $1,135.33.

8. Temporary total disability benefits were paid to Claimant from October 21, 2003 to February 22, 2005, at a rate of $756.89 per week.

9. Claimant received his last payment of benefits on February 23, 2005.

10. Claimant reached maximum medical improvement on March 1, 2005.

11. Employer and Insurer, Signal Mutual Indemnity Association, LTD, filed a Notice of Controversion on March 1, 2005.

12. Claimant timely filed a Request for Compensation on March 31, 2005.

13. Claimant timely filed his Notice of Claim.

14. Claimant has not returned to work for Employer since October 20, 2003.

ISSUES

1. Whether Claimant has sustained a loss of wage-earning capacity, and if so, the nature and extent of that loss.

2. Whether attorney fees should be awarded to either party.

3. Whether Employer/Insurer are entitled to relief under Section 8(f) of the Longshore Act.

CONTENTIONS

Claimant's Contentions

Claimant argues that he is totally and permanently disabled due to the effects of an October 20, 2003 work-related injury. As a result of this injury, he is unable to resume his prior position with Employer as a container and chassis mechanic.

Claimant further alleges that Employer failed to show that suitable alternate employment opportunities existed in the community. Claimant unsuccessfully searched for jobs in the community. Nor did Employer show that it had suitable alternative employment at its facility.

Employer's Contentions

Employer argues that Claimant did not suffer any disabling injury as a result of the October 20, 2003 accident. Any loss of wage-earning capacity should be attributed to prior incidents, including a 1985 motorcycle accident.

Even if the undersigned finds that Claimant did suffer a disabling injury on October 20, 2003, Claimant has not endured any loss of wage-earning capacity because he was offered suitable alternate employment at Employer's facility. Employer's vocational expert also found numerous available jobs in the area that Claimant could have performed despite his disabilities. Claimant, however, did not diligently attempt to procure employment.

SUMMARY OF THE EVIDENCE[1]

Claimant

Claimant testified at the hearing. (TR 15) He was born in 1955 and attended school through the ninth grade. (TR 15) He has no formal vocational training or typing skills. (TR 15) He has worked as a container and chassis mechanic for approximately twenty-two years. (TR 17) This job requires Claimant to swing a sledgehammer, use vibrating tools and perform overhead work. (TR 18-19)

In 1985, Claimant broke his left collarbone in a motorcycle accident. (TR 35, 52) He has occasionally taken medication for pain in his left shoulder since this accident. (TR 53) In 1986, Claimant fell off of a porch and injured his right shoulder. (TR 53) Claimant also injured his

[1] *The following abbreviations will be used as citations to the record:*

JS - Joint Stipulations;
TR - Transcript of the Hearing
CX - Claimant's Exhibits; and
EX - Employer's Exhibits.

neck in 1992 in a work-related accident. (TR 35) The severity of this injury required him to undergo surgery. (TR 35) A fall in 1994 resulted in a sprained hand. (TR 52) He has continued to experience pain in his neck, back and shoulders since these incidents occurred.

On October 20, 2003, Claimant sustained an injury to his left shoulder while working for Employer. (TR 19-20) Since this incident, Claimant has experienced continuous pain in his shoulder. (TR 20) Claimant had shoulder surgery in an effort to improve his condition, but he stated that his condition worsened after the surgery. (TR 38) He has been prescribed multiple medications to reduce the pain and help him sleep. (TR 21) These medications make him drowsy, but he is still only able to attain approximately four hours of sleep each night. (TR 22-23) Prior to the accident, he had no trouble sleeping and averaged approximately eight hours of sleep per night. (TR 23-24)

Claimant has also received medical attention for pain in his neck after the October 2003 incident. (TR 36) He has seen Dr. Cliff Cannon, a neurosurgeon, to discuss the discomfort in his neck. (TR 36)

Claimant stated that, given the condition of his shoulder, he could not return to work as a container and chassis mechanic for Employer. (TR 23) Furthermore, he did not believe that he could perform any light duty job for Employer that would require him to use both of his arms, such as operating a forklift or a jockey truck. (TR 24)

Claimant had not met with anyone to discuss returning to work. (TR 57) Further, Claimant denied ever speaking to any other person over the phone about returning to work. (TR 57)

Claimant has not worked anywhere else since the October 20, 2003 accident. (TR 54) He stated at the hearing that he diligently tried to obtain every job suggested by Employer's vocational rehabilitation counselor, but he was not offered a single position. (TR 29-34) Most of the employers had already hired employees to fill these positions by the time Claimant attempted to contact them. (TR 29-34) For example, jobs at a humane society and at a retirement home, as well as positions as an exterminator, delivery person, electrical helper and salesperson had all been filled. (TR 29-33) Claimant said that he attempted to contact another employer who needed a delivery driver, but was unable to find the address or phone number. (TR 29)

Of the remaining jobs suggested by the vocational counselor, Claimant only filled out two job applications. (TR 55) For the rest, he called the employers, but never filled out an application or met with the employers in person. (TR 30-34, 55-56)

Claimant further stated that, even if he were offered one of the positions suggested by the vocational counselor, he would be unable to perform many of the daily tasks that the job required. For example, the vocational counselor found a rental car company that was looking for a person to clean the cars and a humane society that needed help maintaining kennels and caring for the animals. (EX M) Claimant said that it would be unfeasible for him to perform "any kind of job that required [him] to use both [of his] arms," such as working with large dogs

at an animal shelter or washing cars. (TR 24-25, 30, 32) However, on cross examination counsel for Employer noted that none of Claimant's restrictions specifically prevented Claimant from using both arms. (TR 43) The restrictions prevented "overhead activities, forward flexion, use of impact hammers, [or] pulling." (TR 43)

The vocational counselor also suggested positions that involved driving a shuttle, a delivery van or a cab. (EX M) Claimant contended that physical pain in his back and shoulders, as well as drowsiness caused by his medications, would prevent him from being able to drive a vehicle for an extended period of time. (TR 24-25, 31) On cross examination, however, Claimant admitted that he had a valid Georgia driver's license and that no doctor had ever told him that he was unable to drive. (TR 50) In fact, no doctor had ever placed any restrictions on his ability to operate a vehicle. (TR 5)

Claimant also stated that he diligently searched for employment at more places than the vocational counselor listed, although he was not offered a single position. (TR 26-29, 34) He attempted to secure employment at International Longshoremen Association, Maxim Crane Works, Black Creek Feed and Seed, Thompson's Tire and Wheel, Dollar General, Maycrest Hardware, Coastal Crane and Rigging, Econo Car Rental, the YMCA, AirQuest Heating and Air, Body Shop, Inc., and Hale's Electrical. (TR 26-29)

However, on cross examination, Claimant admitted that he had never visited Maxim Crane. (TR 39) Nor did he put in an employment application there. (TR 39) In fact, he was not responding to any sort of ad or job opening at the facility. He simply called to see if they were hiring. (TR 39)

Claimant did fill out an actual job application at a Dollar General for a job that would have required Claimant to stock shelves. (TR 42) However, one limitation that Dr. George placed on Claimant was no overhead activities. (CX 8)

Claimant stated that he also went to Black Creek Feed and Seed and Maycrest Hardware. (TR 41, 43) However, the record states that Maycrest Hardware was not even hiring at the time. (TR 50) It is unclear from the record whether Black Creek Feed and Seed was hiring at the time.

Claimant also went to Thompson's Tire and Wheel. (TR 41) From the record, it appears as though Thompson's Tire and Wheel was hiring for a position of delivery person. (TR 41-42) He did not fill out any formal application there. (TR 42)

He applied at the YMCA because his step-daughter worked there. He filled out an application for this position and spoke with a person there. (TR 45) However, the person he spoke with was his step-daughter. (TR 45) She does not have any power to hire new employees. (TR 45-46)

Claimant spoke with a person at AirQuest Heating and Air. (TR 46) The person he spoke with was an old friend of his. (TR 46) This old friend was not the manager, nor was he in charge of hiring or firing. (TR 46) Further, it is unclear from the record whether this business was seeking an employee or whether Claimant simply checked to see if it was hiring.

Claimant also stated that he applied to work as a parts runner at Body Shop, Inc. and Hale Electrical. (TR 47-49) He had been friends with the owners of these two places for over twenty years. At the hearing, when asked "what job did you apply for [at Hale Electrical]?", Claimant replied "[a] parts runner." (TR 49) However, Claimant then stated that there were no actual positions available at Hale Electrical for which he could have applied. When Claimant was asked at the hearing, "what job did you apply for at the Body Shop, Inc.?", Claimant again responded "parts runner." (TR 49) It is unclear whether Body Shop was actually hiring for a parts runner or whether, as with Hale Electrical, Claimant just inquired as to whether a position was available.

At the hearing, Claimant also admitted that he had not contacted any potential employer prior to his August 4, 2005 deposition. (TR 38) In fact, Claimant first attempted to contact several of the above-mentioned employers within two weeks of the hearing. (TR 38-44)

Gary Scott[2]

Mr. Scott testified in Claimant's workers' compensation trial. (CX 13)

Mr. Scott is the president of Claimant's union. (CX 13) This union performs maintenance and repair on containers and chassis of refrigerated units. (CX 13) Although he has been in this position for twenty-one years, Mr. Scott is still familiar with the job requirements of a container and chassis mechanic. (CX 13)

Mr. Scott described the physical tasks a container and chassis mechanic must perform. (CX 13) These included "being able to bend, squat, lift, stoop, pull, [and] tug [as well as] various different tasks." (CX 13) He further stated that container mechanics must work with their arms overhead and lift heavy items. (CX 13)

Mr. Scott stated that a container and chassis mechanic "pretty much has to do everything." (CX 13) In other words, he did not believe that a container and chassis mechanic could perform any job, other than writing up work orders, if he had restrictions such as no overhead lifting and no forward flexion. (CX 13)

During cross examination, Mr. Scott admitted that he was aware that some members of his union worked for Employer in light duty positions when they had physical limitations. (CX 13)

Mr. Scott also stated during cross examination that nothing in Claimant's contract with the union would have prevented him from returning to light duty or restricted duty work for Employer. (CX 13)

Dr. John George

[2] In CX 13, this witness is identified as Gary D. Scott. However, in the transcript from the hearing, Claimant and Employer both refer to this individual as Kerry Scott. (TR 7) For the sake of uniformity, he will be referred to as Gary Scott throughout this opinion.

A deposition of Dr. John George was held on September 20, 2005. (CX 8) Dr. George is an orthopedic surgeon who has treated Claimant since July 2003. (CX 8) Claimant first came to Dr. George on July 28, 2003 for pain in his shoulders, knee and neck. (CX 8) An X-ray of his left shoulder showed some degeneration of the A/C joint. (CX 8) To ease his pain, Dr. George gave Claimant an injection in both of his shoulders. (CX 8)

Dr. George next examined Claimant on August 18, 2003. (CX 8) He believed that Claimant had A/C joint arthritis and inflammation of the rotator cuff. (CX 8) He also recommended an MRI of Claimant's shoulder to ensure that there was no tear in the rotator cuff, but no MRI was performed at that time. (CX 8)

Claimant saw Dr. George again on January 5, 2004. (CX 8) In his deposition, Dr. George stated that "the symptoms were a little different this time." (CX 8) On this occasion, Claimant complained of pain in his shoulders as well as "having catching" in his left shoulder. (CX 8)

Based on Claimant's ongoing shoulder problems, Dr. George recommended arthroscopic surgery. (CX 8)

Claimant had an MRI on February 2, 2004. (CX 8) The MRI showed rotator cuff impingement, A/C joint arthritis, inflammation and a labral tear. (CX 8) Dr. George stated in his deposition that the impingement, A/C joint arthritis and inflammation were most likely present before October 20, 2003. (CX 8) However, Dr. George could not say with medical certainty when the labral tear occurred because it is not possible to date a labral tear. (CX 8)

Dr. George noted that Claimant's complaints in July 2003 and August 2003 were not symptomatic of a labral tear. (CX 8) One major indication of a labral tear is that the patient "will get that catching sensation of the shoulder." (CX 8) Claimant did not complain of "having catching" in his shoulder until soon after the October 20, 2003 accident. (CX 8)

Dr. George also noted that if Claimant suffered a labral tear while working on October 20, 2003, the labral tear would have "change[d] his shoulder permanently." (CX 8)

Claimant had arthroscopic surgery on February 20, 2004. (CX 8) On May 11, 2004, Dr. George examined Claimant. (CX 8) Claimant complained of pain in his shoulder and stated that he did not think he could return to work. (CX 8) Dr. George stated that it was premature to say that Claimant would be unable to return to work in any capacity. (CX 8)

Claimant saw Dr. George again on June 8, 2004. (CX 8) Claimant told Dr. George that he was in so much pain that he could not "do anything." (CX 8) Dr. George then ordered a functional capacity evaluation. (CX 8) Based on the results of this functional capacity evaluation, Dr. George issued an impairment rating of five percent. (CX 8) In his deposition, Dr. George claimed that the injury Claimant sustained on October 20, 2003 was probably insufficient, on its own, to cause the five percent impairment to Claimant's shoulder. (CX 8)

The October 20, 2003 accident, coupled with the degeneration that Claimant has had since at least July 2003, resulted in the five percent impairment rating. (CX 8)

Dr. George also stated that, because of the degeneration in his shoulder, Claimant would have probably needed arthroscopic surgery at some point in the future, even if the October 20, 2003 injury never occurred. (CX 8) However, on cross examination Dr. George admitted that, in his opinion, the October 20, 2003 injury hastened or exacerbated Claimant's need for surgery. (CX 8)

Dr. George determined that Claimant could return to work with some restrictions, such as no overhead lifting. (CX 8) However, when Employer sent Dr. George a Workers' Compensation Report, someone in Dr. George's office accidentally indicated that Claimant could return to work without restrictions. (CX 8) Employer received this status report on February 25, 2005. This confusion was rectified sometime in March when Dr. George informed Employer that the information in the Workers' Compensation Report was erroneous and that Claimant did indeed have restrictions. (CX 8, TR 103-104)

Bobby Casteel

Mr. Casteel, terminal manager for Employer, testified at the hearing. (TR 65) Mr. Casteel stated that, while Claimant was on leave, Employer initiated a light duty program that allowed injured employees to return to work and perform jobs that would not be beyond their physical capabilities. (TR 71) Employees would be accommodated if there were elements of a light duty job that they were physically unable to perform. (TR 73)

On cross examination, Mr. Casteel conceded that he had never before mentioned that an employee would be accommodated if he were unable to perform some of the light duty tasks. (TR 78-81) He further noted that the employees in the light duty program only worked there until they were released to perform full duty work. (TR 82) This was usually six to twelve weeks. (TR 82) However, he later claimed that Employer would permit Claimant to perform light duty work for as long as was necessary. (TR 85)

Light duty positions included jockey truck operators, forklift operators, clerical work, parts inventorying work and estimators. (TR 69)

During cross examination Mr. Casteel implied that these light duty positions occasionally required some physical strength. (TR 76-80) For example, an estimator must check containers, which are nine feet tall, for damage by climbing to the top of it. (TR 79-80) Further, although parts inventory workers are not required to do much heavy lifting, some overhead reaching may be involved. (TR 83-84) However, Mr. Casteel reiterated that, with any light duty position, Claimant would be accommodated whenever he could not perform a certain activity. (TR 77-84)

Mr. Casteel spoke with Claimant by telephone in March 2005 about Claimant's return to work. (TR 74-75) During this conversation, he told Claimant that Claimant was to return to his old position the following week. (TR 75) Claimant replied that he had restrictions and would be unable to return to work. (TR 67)

Mr. Casteel subsequently confirmed that Claimant had some physical limitations and could not return to his old position. (TR 67-68) Mr. Casteel then attempted to contact Claimant by telephone two more times during the following week to talk with him about Employer's light duty program. (TR 67-68) No one answered the phone, but he left two voice messages asking Claimant to contact him. (TR 67-68) Claimant never contacted Mr. Casteel. (TR 68)

On cross examination, Mr. Casteel admitted that he never actually offered Claimant a particular job in either of his messages. (TR 92) Instead, he simply asked Claimant to call him back or come to the facility to talk about returning to work. (TR 92-93)

Mr. Casteel also admitted on cross examination that he never wrote to Claimant offering him a position. (TR 75) Nor did he send Claimant a description of any light duty position. (TR 75) Nor did he ever attempt to discern whether Claimant could perform any available light duty position by presenting a job description to Claimant's treating physician for approval. (TR 76)

Mr. Casteel stated that he did not offer Claimant any specific job because it was unclear which, if any, light duty positions Claimant could perform, given his restrictions. (TR 92)

Mr. Casteel noted that Claimant could not currently receive a light duty position with Employer because Employer hired more people in May 2005. (TR 89-91) In order to work for Employer now, Claimant would have to wait until Employer hired men from his union and the union sent him. (TR 89-91)

Bruce Revelle

Mr. Revelle testified at the hearing. (TR 94) He is the claims adjuster and claims manager who handled Claimant's workers' compensation claim. (TR 94)

Mr. Revelle has supervised multiple cases where injured workers have returned to work by participating in Employer's light duty program. (TR 96) In fact, Mr. Revelle stated at the hearing that Employer had "a very vigorous return-to-work program for [its] injured employees. Virtually everyone that has been released with restrictions that [he] can remember [has] been found a position within the company." (TR 101)

Mr. Revelle also testified that he received Claimant's work status report from Dr. George on February 25, 2005. (TR 95) This report stated that Claimant could be released to return to work without restrictions. (TR 95) Mr. Revelle then called Claimant and told him that he must return to his prior work. (TR 95) Mr. Revelle stated that Claimant claimed that he "had not been released, he still had many restrictions, and he could not return to work." (TR 95) Mr. Revelle then admitted that he was not made aware that Claimant actually had several physical restrictions until approximately March 1, 2005. (TR 106)

Brian Murphy

Mr. Murphy, Employer's corporate safety director, testified at the hearing. (TR 118)

Mr. Murphy stated that he spoke with Claimant over the telephone in March 2005 about Claimant's return to work. (TR 126) During this conversation Mr. Murphy told Claimant that "he had been released with restrictions, that [Employer] would accommodate his injury, and he needed to come in and discuss it. . . ." (TR 126) In response to Mr. Murphy's statements, it is alleged that Claimant stated that "he was not coming to work out there anymore." (TR 127)

However, on cross examination, Mr. Murphy was shown a memorandum he wrote after speaking with Claimant. (TR 131) In this memorandum, Mr. Murphy noted that when he spoke with Claimant, Claimant informed him that he could not return to work. (EX D)

Tonetta Watson-Coleman

Ms. Watson-Coleman testified at the hearing. (TR 134) She is a vocational rehabilitation consultant who performs employability assessments and labor market surveys. (TR 134, 137)

Before meeting with Claimant, Ms. Watson-Coleman examined many of his medical records, including records from Dr. George, Dr. Cliff L. Cannon and St. Joseph Chandler Work Smart. (TR 138) She also reviewed Claimant's functional capacity evaluation report and a recorded statement that Claimant made. (TR 138)

Ms. Watson-Coleman met with Claimant on March 10, 2006. (TR 138-139) Based on this meeting and all of the information she reviewed, Ms. Watson-Coleman determined that Claimant could perform sedentary and light duty jobs. (TR 141)

After the meeting, Ms. Watson-Coleman began compiling data for her labor market survey. (TR 142) She used the Internet to access various employers, utilized the Yellow Pages so as to be able to telephone employers in Savannah, and searched various websites such as careerbuilder.com, americasjobbank.com and the Georgia Department of Labor's database. (TR 142) She determined that there were jobs in the Savannah area that Claimant could perform. (TR 145) She then compiled a list of some of these potential jobs. (TR 145) Included on this list were the following positions: service route driver, exterminator, delivery driver, shuttle driver, cab driver, school bus driver, porter, security gate guard, maintenance worker, store laborer, salesperson, electrical helper, fast food worker, insulation worker, kennel worker and beekeeper. (EX M) The posted wages for these positions ranged between $5.15 and $11.00 per hour. (TR 145) Ms. Watson-Coleman stated that, while the exact above-mentioned jobs may not have been available in 2005, comparable jobs would have been available. (TR 145-146)

Either Ms. Watson-Coleman or a member of her staff personally contacted every employer, except the Department of Labor, who advertised the above-mentioned positions. (TR 150-151) She asked each employer if Claimant would have trouble performing the available position given his relevant physical limitations. (TR 156) She stated that she "presented the employers with a complete physical capacity picture of [Claimant]. . . ." (TR 155)

However, Ms. Watson-Coleman admitted during cross examination that she did not ask any employer to consider the effects of the medications that Claimant was taking. (TR 156) She

then stated that during her meeting with Claimant she asked him to list his complaints and he never mentioned any problems with his medication. (TR 158)

Ms. Watson-Coleman also admitted during cross examination that she never asked employers to consider any right shoulder problems. (TR 160-165) When asked whether she told employers about the pain that Claimant alleged to have in his neck and back, she stated, "I don't recall seeing anything about [a] right shoulder [injury]. As far as his neck and back [pain], there was reference to that, but there was no indication in the notes that it affected his work abilities in any way. I did not see any restrictions on those." (TR 160) However, she then claimed that she considered "his total medical picture and guidelines" and attempted to find jobs that he would physically be able to perform. (TR 160, 172).

Ms. Watson-Coleman also failed to mention Claimant's hepatitis C to any potential employers. (TR 164-165)

On April 25, 2006, Ms. Watson-Coleman provided a list of the above-mentioned potential jobs to Dr. George for his review. (TR 172) Dr. George determined that some of the positions would be inappropriate for Claimant given his restrictions. (EX M) He did not think that Claimant was capable of performing the following positions: service route driver, maintenance worker, store laborer, school bus driver and insulation worker. (EX M) He found the remaining positions to be suitable. (EX M)

DISCUSSION

Section 20(a) Presumption

A claimant may only receive compensation under the Longshore Act for an injury that arises out of, and occurs in the course of, his employment. Universal Mar. Serv. Corp. v. Dir., Office of Workers' Comp. Programs, 137 Fed.Appx. 210, 212 n. 1 (11th Cir. 2005). Once a claimant has established that his injury arose out of, and occurred in the course of, his employment, it is presumed that the employee's claim comes within the provisions of the Longshore Act. See 33 U.S.C. § 920(a) (2000).

To establish his prima facie case that he suffered from an injury arising out of, and occurring in the course of, employment, the claimant must at least show that working conditions existed which could have caused the harm. U.S. Industries/Federal Sheet Metal, Inc. v Director, OWCP (Riley), 455 U.S. 608, 614-616 (1982).

In the present case, Claimant has established that he has suffered physical injury to his left shoulder and that conditions existed at work on October 20, 2003 that could have caused this physical injury. In fact, the parties have stipulated that on October 20, 2003, the date of the accident, Claimant was working at the Garden City Terminal of the Georgia Ports Authority when he heard a pop in his left shoulder as he was pulling on a slider pin to allow a chassis to slide on a container. The parties have further stipulated that this claim is subject to the Longshore Act and that Claimant's left shoulder injury arose out of, and occurred in the course of, his employment with Employer.

In view of the above, the undersigned finds that the Section 20(a) presumption has been met and this case comes within the provisions of the Longshore Act.

Loss of Wage-Earning Capacity

The next issue that must be addressed is whether Claimant is qualified to receive disability coverage under the Longshore Act due to a loss of wage-earning capacity.

The Longshore Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2000). This disability may be either partial or total. See 33 U.S.C. § 908 (2000). In addition to a claimant's disability being classified as partial or total, the disability is also classified as either temporary or permanent in nature. See 33 U.S.C. § 908 (2000).

Nature of Disability

1. Permanent Disability Award Beginning March 1, 2005

There are two tests for determining whether a disability is permanent in nature. Eckley v. Fibrex and Shipping Co., Inc., 21 BRBS 120, 122 (1988). Under the first test, an employee is permanently disabled if he reaches maximum medical improvement and still has some residual disability. Id. Under the second test, even if maximum medical improvement has not yet been reached, "an employee [is] permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968). [3]

In the present case, Claimant is permanently disabled. Both parties have stipulated that Claimant reached maximum medical improvement on March 1, 2005. Despite reaching maximum medical improvement, Claimant has some residual disability.

After Claimant underwent arthroscopic surgery on February 20, 2004 and had a functional capacity evaluation, Dr. George issued an impairment rating of five percent. (CX 8) Dr. George claimed that the October 20, 2003 accident, coupled with the degeneration in Claimant's shoulder, caused the five percent impairment rating. (CX 8) Dr. George then placed physical restrictions on Claimant due to his physical impairments. (CX 8, TR 43) These restrictions have never been lifted, which demonstrates that Claimant has a lasting residual disability. Thus, Claimant is permanently disabled.

2. Temporary Disability Award from February 23, 2005 until February 28, 2005

[3] "The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981." Universal Mar. Serv. Corp., 137 Fed.Appx. at 212, n.2.

An injured worker's impairment may be found to have changed from temporary to permanent if he reaches maximum medical improvement and still has some residual disability or if his condition has continued for an extended duration and appears to be indefinite. Eckley, 21 BRBS at 122-123.

On March 1, 2005, based on Dr. George's observations and on the results of Claimant's functional capacity test, Dr. George concluded that Claimant had reached maximum medical improvement. (EX J) Since Claimant did not reach maximum medical improvement until March 1, 2005, the undersigned finds that, from February 23, 2005 until February 28, 2005, the Claimant was temporarily disabled.

Extent of Disability

1. Partial Disability Award Beginning March 1, 2005

To be awarded total disability benefits, the employee bears the initial burden of proving that he is totally disabled. To meet this burden, the employee must establish a prima facie case of total disability by showing that he is unable to return to his regular employment due to a work-related injury. Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1007 (5th Cir. 1978).

In the present case, Claimant has met his initial burden. The evidence proves that Claimant was unable to return to his regular employment. The evidence also proves that Claimant was unable to return to his regular employment due to a work-related injury.

First, the evidence proves that Claimant was unable to return to his regular employment. Claimant's prior work as a container and chassis mechanic requires an individual to perform certain activities, such as working with his arms overhead. Since Dr. George issued an impairment rating of five percent and determined that Claimant could not perform overhead activities, engage in forward flexion or use impact hammers, Claimant has clearly proven that he was unable to return to his regular employment.

Second, the evidence in this case proves that Claimant was unable to return to his regular employment due to a work-related injury. Employer argues that, although Claimant was unable to return to work, his inability to perform his regular employment was not related to the October 20, 2003 accident. The evidence suggests otherwise.

Dr. George saw Claimant both before and after the October 20, 2003 accident for pain in his shoulders. (CX 8) When Claimant visited Dr. George after October 20, 2003, his complaints were different than before. (CX 8) After the accident, Claimant complained of "having catching" in his left shoulder. (CX 8) An MRI showed that Claimant had, among other problems, a labral tear. (CX 8) Although Dr. George could not say with medical certainty when the labral tear occurred, he noted that Claimant's complaints prior to the October 20, 2003 accident were not indicative of a labral tear. (CX 8) Claimant's complaints of "catching" after October 20, 2003, in contrast, were symptomatic of a labral tear. (CX 8)

Dr. George declared that a labral tear would permanently change Claimant's shoulder and that, although Claimant would probably have needed arthroscopic surgery in the future even if the October 20, 2003 injury never occurred, because of degeneration in Claimant's shoulder, the October 20, 2003 injury hastened or exacerbated Claimant's need for surgery. (CX 8)

The above-mentioned evidence supports findings that Claimant sustained a labral tear from a work-related accident on October 20, 2003, that this injury permanently changed his shoulder, exacerbated his preexisting injuries, hastened his need for surgery and was a factor in determining his five percent impairment rating and his work restrictions. Claimant thus met his burden of showing that he was unable to return to his regular employment because of a work-related injury.

By showing that he was unable to return to his regular employment due to a work-related injury, Claimant has established a prima facie case of total disability. Once a claimant establishes his prima facie case, the employer must demonstrate that suitable alternate employment exists. Universal Mar. Serv. Corp., 137 Fed.Appx. at 214, n.4. See also Nguyen v. Ebbtide Fabricators, 19 BRBS 142, 144-145 (1986).

In other words, the burden shifts to the employer to show the existence of realistically available job opportunities. The employer must prove the availability of actual employment opportunities by identifying specific suitable jobs. In addition, for a job opportunity to be realistically available, it must be located in the geographical area where the injury occurred. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043 (5th Cir. 1981).

The claimant must be capable of performing the job, given his age, education level, work experience and physical restrictions. Diamond M. Drilling Co., 577 F.2d at 1005-1006. The trier-of-face may rely on the testimony of vocational counselors, so long as the counselors identify realistic jobs and consider the claimant's age, education, industrial history and physical limitations when looking for appropriate positions. Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 382 (1983).

Furthermore, for a job opportunity to be realistically available, all pre-existing physical limitations must have been considered along with restrictions stemming from the work-related injury. See Fox v. West State, Inc., 31 BRBS 118, 121 (1997) (stating that "pre-existing limitations must be addressed in determining whether a job is realistically available").

However, an employer or vocational counselor does not have to inform a potential employer of every medical problem the claimant has ever had in order to prove that suitable alternate employment exists, especially when the claimant does not have restrictions based on these prior problems and these conditions are not found to impair claimant's wage-earning capacity. Fox, 31 BRBS at 121-122.

In the present case, Employer made two assertions. First, Employer claimed that it demonstrated the existence of suitable alternate employment by offering Claimant a light duty position in its facility. Second, Employer alleged that numerous other suitable jobs were

available in the Savannah area. Employer failed to prove that it offered Claimant a light duty position. However, it did show that suitable alternate employment existed in the Savannah area.

Case law establishes that an employer can meet its burden of proof by offering a claimant a job in its facility. Spencer v. Baker Agric. Co., 16 BRBS 205, 207 (1984). This can include light duty positions. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224, 226 (1986). In order to meet its burden of proof by offering a light duty job in its own facility, "employer must demonstrate the availability of light duty work which is necessary and which claimant is capable of performing." Id.

Former cases have held that, when the "employer never discussed with the claimant the type of light duty work available, the salary or whether he could perform the work[,]" the employer "did not satisfy its burden of showing suitable alternative employment." See Spencer, 16 BRBS at 208.

In the present case, Employer never discussed with Claimant the specific type(s) of light duty work available. Nor did Employer know whether Claimant could perform the work. Most importantly, Employer never actually offered Claimant a specific light duty position.

No formal job offer, either written or oral, was ever extended to Claimant. Furthermore, no specific position was ever articulated to Claimant. Mr. Casteel, admitted that he never offered Claimant a particular job in either of the messages he left for Claimant because it was unclear which, if any, light duty positions Claimant could perform, given his restrictions. (TR 92) Instead, he simply asked Claimant to call him back or come to the facility to talk about returning to work. (92-93) Nor did he attempt to discern whether Claimant could perform any available light duty position by presenting a job description to Claimant's treating physician for approval. (TR 76) Thus, there was never even any guarantee that Claimant would be able to receive another position with Employer.

Employer's corporate safety director, Brian Murphy, stated that he told Claimant that Employer would accommodate his injuries. (TR 126) Mr. Murphy's alleged statement indirectly appears to guarantee Claimant some position. However, this conflicts with Mr. Casteel's contentions that Employer could not offer Claimant a specific job until meeting with him because it was unclear whether Claimant could perform any light duty positions.

Thus, the evidence fails to prove that Employer offered Claimant suitable alternative employment at its facility.

Employer did, however, show that suitable alternate employment existed in the Savannah area.

Employer's vocational counselor, Ms. Watson-Coleman, identified numerous jobs in the Savannah area which, in her opinion, Claimant would be able to perform. (TR 145, EX M) When searching for appropriate employment opportunities, Ms. Watson-Coleman considered Claimant's education level, age and physical restrictions. For example, none of the positions required the applicant to have a high school diploma and no position required previous

experience. (EX M) Ms. Watson-Coleman considered Claimant's total medical picture when looking for jobs. (TR 138, 160, 172) She attempted to ensure that Claimant would be able to perform the jobs by providing descriptions of each of the above-mentioned jobs to Dr. George, who found a majority of the jobs to be appropriate. (EX M)

Claimant argued that Ms. Watson-Coleman failed to take some of his alleged medical problems into account, such as drowsiness caused by his medications. (TR 156) Nor did she ask employers to consider any right shoulder problems or the fact that Claimant had hepatitis C. (TR 164-165)

As is mentioned above, although all pre-existing physical limitations must have been considered along with restrictions stemming from the work-related injury in order for a job opportunity to be realistically available, a vocational counselor does not have to inform an employer of every medical problem the claimant has ever had, especially when these conditions are not found to impair claimant's wage-earning capacity. Fox, 31 BRBS at 121-122.

In her testimony, Ms. Watson-Coleman stated that, regarding Claimant's neck and back pain, "there was reference to that [pain], but there was no indication in the notes that it affected his work abilities in any way. I did not see any restrictions on those." (TR 160) There is no evidence in the record that hepatitis C, discomfort in Claimant's right shoulder or Claimant's medications would in any way affect his wage-earning capacity. In fact, Claimant never mentioned, prior to the hearing, that his medications caused drowsiness. (TR 158) Further, Dr. George approved jobs that required driving and no doctor ever told Claimant that he was unable to drive. (TR 50)

The undersigned has reviewed the job descriptions, compared these descriptions to the Claimant's restrictions and determined that Claimant's medical restrictions are compatible with the jobs located by Ms. Watson-Coleman and approved by Dr. George.

Employer therefore has met its burden in showing that suitable alternate employment existed in the Savannah area. Once an employer meets its burden, the burden shifts back to the claimant to prove that he diligently attempted to secure employment. Fox 31 BRBS at 122.

If a claimant demonstrates that he diligently attempted, but was unable, to obtain a job identified by the employer, the claimant may prevail. See Roger's Terminal & Shipping Corp. v. Director, OWCP, 18 BRBS 79, 83 (CRT)(1986). However, an administrative law judge does not abuse his discretion by "noting claimant's lack of diligence in seeking employment." Turney, 17 BRBS at 236-237 n. 7. Further, an administrative law judge may determine that a job is suitable even though the claimant has dismissed the job because he finds it to be unacceptable. See Dove v. Southwest Marine of San Francisco, Inc., 18 BRBS 139, 141 (1986)(stating that a claimant who refused suitable alternate jobs because they paid less than $25,000 per year was not totally disabled).

In the present case, after noting certain physical restrictions, Dr. George released Claimant to do sedentary or light duty work on February 23, 2005. (CX 8) However, Claimant admitted that he did not look for work before his August 17, 2005 hearing with Judge Bohler, a

state employee. (TR 38) Prior to that date, he did not put in any job applications or make contact with any potential employer. (TR 38)

Given that, for the most part, Claimant's job search was conducted within a few weeks of the hearing, which was months after he was released by Dr. George to work, and consisted solely of either calling to see if any opening was available, regardless of whether the business was hiring, or speaking with friends or relatives, even though these friends or relatives often had no hiring power and worked for employers that were not hiring, the undersigned finds that Claimant did not diligently attempt to procure employment.

2. Total Disability Award from February 23, 2005 until February 28, 2005

As is stated earlier, to be awarded total disability benefits, an employee must show that he is unable to return to his regular employment due to a work-related injury. Diamond M. Drilling Co., 577 F.2d at 1007. For the same reasons as were laid out above, Claimant has shown that he was unable to return to his regular employment due to a work-related injury.

Bruce Revelle stated that he received a work status report from Dr. George on February 25, 2005 that he released Claimant to return to work without restrictions as of February 23, 2005. (TR 95) Mr. Revelle called Claimant and told him that he must return to his prior work, but Claimant stated that he "had not been released, he still had many restrictions, and he could not return to work." (TR 95) Around March 1, 2005, Mr. Revelle learned that Claimant had actually been released with restrictions. (TR 106)

Thus, Employer did not attempt to discuss light duty work with Claimant until after March 1, 2005. Employer was not even aware that Claimant would need suitable alternate employment until this date. Further, as is made clear by Claimant's response to Mr. Revelle, Claimant did not believe that he had been released to return to work as of February 23, 2005.

Given this, the undersigned finds that Claimant was totally disabled from February 23, 2005 until February 28, 2005

Calculating Claimant's Permanent Partial Disability Award Beginning March 1, 2005

The undersigned therefore grants Claimant an award for permanent partial disability. This award is for a disability that resulted from a shoulder injury. The Board has held that, when a claimant's disability results from a shoulder injury, the disability is compensable under Section 8(c)(21) of the Longshore Act, since the shoulder is not a body part that is specifically listed in the schedule. Andrews v. Jeffboat, Inc., 23 BRBS 169, 173 (1990).

Section 8(c)(21) states that "[i]n all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." 33 U.S.C. § 908(c)(21) (2000).

Section 8(h) of the Longshore Act states that, when an employee is to be compensated under Section 8(c)(21) of the Longshore Act and has received no actual earnings after his injury,

> the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h) (2000).

Claimant's degree of physical impairment, his prior employment and the nature of his injury have been noted. Further, when determining Claimant's wage-earning capacity, the undersigned has considered Claimant's physical condition, age, education level, employment history and the availability of employment.

The undersigned notes that Employer's vocational counselor determined that Claimant could find available employment that averaged between $5.15 and $11.00 per hour, which equals between $10,712.00 and $22,880.00 per year.[4] (EX M) Dr. George approved jobs on the vocational counselor's list that ranged from $5.15 to $11.00 per hour. (EX M) The undersigned also notes that Claimant has no formal vocational training, has no typing skills and has only a ninth grade education. (TR 15) He never received his GED. (EX M) He has worked as a container and chassis mechanic for approximately twenty-two years. (TR 17) It appears that he was a full time employee during most, if not all, of that time.

Given all of this, the undersigned finds that Claimant has a wage-earning capacity of $5.15 per hour, or $10, 712.00 per year.

According to Section 8(c)(21) of the Longarm Act, Claimant should thus receive $619.55 per week.[5]

There is no medical evidence that Claimant's October 20, 2003 work-related accident resulted in any injury to his back, neck, knee or right shoulder. Nor is there any medical evidence that Claimant's October 20, 2003 work-related accident aggravated any injury to his back, neck, knee or right shoulder. Neither Dr. George nor Dr. Cannon specifically relate Claimant's neck injuries to the October 20, 2003 accident. Claimant offers no testimony from any other physician drawing such a conclusion. Therefore, the undersigned finds that the October 20, 2003 accident only injured or aggravated an injury to Claimant's left shoulder. Claimant will only be compensated for the injury to his left shoulder.

Calculating Claimant's Temporary Total Disability Award: February 23, 2005 to February 28, 2005

[4] Given these calculations, it is apparent that the vocational counselor expected the Claimant to work a forty hour work week.

[5] This figure does not account for interest.

The parties have stipulated that Claimant's average weekly wage at the time of the accident was $1,135.33. They have further stipulated that temporary total disability benefits were paid to Claimant from October 21, 2003 to February 22, 2005, at a rate of $756.89 per week.

For the aforementioned reasons, Claimant should have received temporary total disability benefits from February 23, 2005 until February 28, 2005. Claimant should therefore receive a temporary total disability award of $648.76 for the period of time spanning from February 23, 2005 until February 28, 2005.

ATTORNEY'S FEES

Section 28(a) of the Longshore Act states,

> [i]f the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. § 928(a) (2000).

Section 28(a) of the Longshore Act states that there must be "successful prosecution" of the claim in order to be awarded attorney's fees. See Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89, 90 (1993). Establishing that a claimant has a permanent disability, for example, is one way that a claimant has successfully prosecuted his claim. See Canty v. S.E.L. Maduro, 26 BRBS 147, 157 (1992).

In the present case, Claimant has successfully prosecuted his claim and met all other requirements imposed by Section 928(a). Thus, Claimant is entitled to an award for attorney's fees.

Section 702.132 of the Code of Federal Regulations states, in part, that

> Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed. The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board or court.

20 C.F.R. § 702.132(a) (2004).

In the present case, Claimant's attorney shall, within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

AVAILABILITY OF SPECIAL FUND RELIEF

Availability of Special Relief Fund for Claimant's Temporary Total Disability Award

Claimant has received temporary total disability benefits for the period spanning from February 23, 2005 until February 28, 2005.

Case law has made it clear that special fund relief is not available for a temporary disability, regardless of its severity. See Jenkins v. Kaiser Aluminum & Chem. Sales, Inc., 17 BRBS 183, 187 (1985).

Therefore, in this case Employer is liable for the entire amount of temporary total disability benefits owed to Claimant.

Availability of Special Relief Fund for Claimant's Permanent Partial Disability Award

The Longshore Act provides, in part, that an employer may only have to provide compensation for 104 weeks when an injured employee has a permanent partial disability, which is not simply related to the injury he just received, and his disability is greater, due to the pre-existing injury, than it otherwise would have been if he had no pre-existing injury. 33 U.S.C. §908(f)(1) (2000).

In such a situation, "[a]fter cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 [33 USC § 944]. . . ." 33 U.S.C. §908(f)(2) (2000).

To shift its burden of paying a claimant's permanent disability award to the Special Relief Fund after 104 weeks, an employer must prove that "the employee had a preexisting permanent partial disability that was manifest to the employer and that contributed to the seriousness of the compensable injury." C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 85 (CRT)(1994).

Permanent Partial Disability that Existed Prior to Work-Related Injury

First, an employer must prove that the claimant had a pre-existing disability. C.G. Willis, Inc., 28 BRBS at 85. In an effort to meet its burden, an employer must establish that the disability predates the employment-related injury. Mikell v. Savannah Shipyard Co., 26 BRBS

32, 37 (1992). This past injury must have resulted in a condition that has caused serious and lasting physical problems. See Smith v. Gulf Stevedoring Co., 22 BRBS 1, 3 (1988).

Courts have held that certain conditions which are the result of aging, such as degenerative disc disease and arthritis, may be considered to be pre-existing disabilities. Greene v. J.O. Hartman Meats, 21 BRBS 214, 216-218 (1988); Gibbs v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 954, 955-956 (1982).

In order to meet its burden, an employer does not have to prove that the claimant has received a physical impairment rating for his pre-existing injury. Smith, 22 BRBS at 3. Nor must an employer prove that a claimant was so injured that his pre-existing condition prevented him from being able to work. Currie v. Cooper Stevedoring Co., Inc., 23 BRBS 420, 425 (1990).

In the present case, Claimant has complained of pain in his left shoulder since 1985, when he broke his left collarbone in a motorcycle accident. (TR 35, 52) The pain has been so serious that he has taken medication for pain in his left shoulder since this accident. (TR 53) His complaints of left shoulder pain since 1985 have been documented. (CX 7)

Claimant came to Dr. George prior to the October 20, 2003 work-related injury. (CX 8) Claimant first visited Dr. George on July 28, 2003 for pain in his shoulders, knee and neck. (CX 8) At that time, Dr. George took an x-ray of Claimant's left shoulder, which showed some degeneration of the A/C joint. (CX 8) To ease his significant pain, Dr. George gave Claimant an injection in both of his shoulders. (CX 8) Dr. George next examined Claimant on August 18, 2003. (CX 8) He believed that Claimant had A/C joint arthritis and inflammation of the rotator cuff.

The evidence thus establishes that Claimant had serious pre-existing left shoulder injuries.

Permanent Partial Disability was Manifest to Employer

An employer must next prove that the claimant's pre-existing injury was manifest to the employer. C.G. Willis, Inc., 28 BRBS at 85.

A pre-existing injury will be deemed to have been manifested to the employer if the "employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." Esposito v. Bay Container Repair Co., 30 BRBS 67, 68 (1996). Medical records do not have to indicate the severity or precise nature of the pre-existing condition for it to be manifest, so long as there is sufficient information that might motivate a cautious employer to consider terminating the employee because of the risk of compensation liability. Topping v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 40, 43-44 (1983).

In the present case, the evidence establishes that Claimant's pre-existing shoulder injuries were manifest to Employer. Claimant has sought treatment and medication for pain in his left shoulder for many years. For example, medical records from 2001 note that "[e]xamination

shows deformity of the left clavicle resulting from an old healed fracture." (EX H) These records from 2001 state that Claimant has experienced a history of pain in this shoulder, and that the pain has made working difficult. (EX H) He was prescribed medication for the pain (EX H)

As is noted above, medical records from Dr. George show that, in July of 2003, an x-ray was taken of Claimant's shoulder which showed some degeneration of the A/C joint and in August of 2003, Dr. George examined Claimant and determined that Claimant had A/C joint arthritis and inflammation of the rotator cuff. (CX 7)

Since there are substantial medical records pre-dating the October 20, 2003 accident that establish that Claimant was having problems with his left shoulder, the undersigned finds that Claimant's pre-existing injury was manifest to Employer.

Permanent Partial Disability Contributed to the Seriousness of the Compensable Injury/ Additional Burden in Permanent Partial Disability Cases

An employer must also prove that the claimant's pre-existing disability "contributed to the seriousness of the compensable injury." C.G. Willis, Inc., 28 BRBS at 85. In other words, the current disability must not be solely caused by the most recent injury. Director, OWCP v. Bath Iron Works Corp., 31 BRBS 155, 158 (CRT) (1997).

An additional burden is also placed on an employer wishing to obtain Section 8(f) relief when an employee is permanently partially disabled, rather than permanently totally disabled. The employer must also prove that the claimant's current level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1).

In the present case, Claimant has been found to be permanently partially disabled. Thus, Employer must prove that Claimant's current disability was not solely caused by the most recent injury and that Claimant's current disability is materially and substantially greater because of the pre-existing injury.

Dr. George stated that the injury Claimant sustained on October 20, 2003 was probably insufficient on its own to cause the five percent impairment to Claimant's shoulder. (CX 8) The October 20, 2003 accident, coupled with the degeneration that Claimant has had since at least July 2003, resulted in the five percent impairment rating. (CX 8) Dr. George also stated that, because of the degeneration in his shoulder, Claimant would have most likely needed arthroscopic surgery at some point in the future even if the October 20, 2003 injury never occurred. (CX 8)

Employer has thus established that Claimant's current disability was not solely caused by the most recent injury and that his current disability is materially and substantially greater because of the pre-existing injury.

For the foregoing reasons, I find that the Employer did establish entitlement to Special Fund relief pursuant to 33 U.S.C. § 908(f).

ORDER

1. The stipulations between the Employer and the Claimant are binding.

2. The compensation amount of $648.76 is payable to Claimant for the period from February 23, 2005 until February 28, 2005, for temporary total disability

3. The compensation rate is $619.55 per week, payable from March 1, 2005, and continuing, for permanent partial disability.

4. Employer shall receive credit for all compensation that has been paid.

5. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. All computations are subject to verification by the District Director.

7. The Claimant's attorney shall within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

8. The application for Section 8(f) relief for permanent partial disability benefits is GRANTED.

9. Upon the expiration of 104 weeks after March 1, 2005, such compensation for benefits and necessary adjustments thereto shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kbe
Newport News, Virginia